



Commonwealth of Massachusetts State Ethics Commission

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SUFFOLK, ss.

COMMISSION ADJUDICATORY
DOCKET NO. 463

IN THE MATTER OF ROBERT DONALDSON

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Robert Donaldson (Mr. Donaldson) pursuant to §5 of the Commission's Enforcement Procedures. This Agreement constitutes a final Commission order enforceable in the Superior Court pursuant to G.L. c. 268B, §4(j).

On September 10, 1992, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Mr. Donaldson. The Commission concluded its inquiry and, on January 26, 1993, voted to find reasonable cause to believe that Mr. Donaldson had violated G.L. c. 268A.

The Commission and Mr. Donaldson now agree to the following findings of fact and conclusions of law:

1. Mr. Donaldson served as the Tolland Health Agent from 1985 until 1991. Mr. Donaldson was appointed to this position by the Tolland Board of Selectmen, who are also the town's board of health. At the times here relevant, the position of health agent was a part-time position, which was unpaid except for the receipt of certain fees, including primarily those described below. Mr. Donaldson was also a Tolland Selectman and Board of Health member from 1983 to 1989. These positions were part-time and only nominally paid. As the Tolland Health Agent and as a selectman and board of health member, Mr. Donaldson was a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. During the times here relevant, Mr. Donaldson was self-employed as a real estate broker and was the owner, with his wife, of the real estate firm Misty Mountain Realty (Misty Mountain), which was then located in Tolland. During the period here relevant, Misty Mountain was the only real estate firm located in Tolland and did business in Tolland and neighboring communities.

3. As Tolland Health Agent, Mr. Donaldson's primary duty was to witness percolation tests (perc tests) of land to determine whether the land was suitable for the installation of a subsurface sewage disposal system (septic system) and was thus buildable. As the town's perc test witness, Mr. Donaldson's role was that of an observer to make sure that the right property was tested and that the engineer or sanitarian doing the test conducted it properly according to Title V (the State Sanitary Code) and local ordinances. For each perc test he witnessed, Mr. Donaldson was paid a fee by the landowner or other person having the test conducted. The witness fee ranged from approximately \$50 to approximately \$100 during the time that Mr. Donaldson was health agent. This fee was paid to Mr. Donaldson regardless of the outcome of the perc test.

4. As a real estate broker, it is Mr. Donaldson's established practice to advise any potential client seeking to list land in Tolland or elsewhere for sale with Misty Mountain that a successful perc test of the land is required before he can represent it to potential buyers as buildable land.^{1/} While he was the Tolland Health Agent, Mr. Donaldson routinely gave such advice to potential clients and then witnessed perc tests of the land as health agent. Mr. Donaldson would then, if the tests were successful, accept the listing of many of these properties with Misty Mountain. In addition, from time to time, Mr. Donaldson would accept a listing of land with Misty Mountain

prior to the land being perc tested, and would then offer the land for sale subject to it passing a perc test. Subsequently, Mr. Donaldson would, as health agent, witness the perc testing of the land.

5. Accordingly, while he was the Tolland Health Agent, Mr. Donaldson engaged in a repeated pattern or practice of witnessing perc tests on land that was already listed for sale with his private real estate firm and of witnessing perc tests on land with the knowledge or expectation that the land would be subsequently listed for sale with his firm if it perced successfully.^{2/} In many cases, Mr. Donaldson's firm brokered the sale of the land in question and received a broker's commission.^{3/} Thus, for example:^{4/}

(a) in or about June 1987, Mr. Donaldson as health agent witnessed successful perc tests on four Tolland lots (10 Colebrook River Rd., EO-19, TS-20 and TT-39) that were already listed with Misty Mountain (Misty Mountain brokered the sales of the first three lots in 1987 and the sale of the fourth lot in 1988);^{5/}

(b) in or about June 1987, Mr. Donaldson as health agent witnessed successful perc tests on five Tolland lots (OPT-4, TF-5, ON-28, TT-30 and TT-32) and then, in July 1987, Misty Mountain entered into listing agreements for those lots (Misty Mountain brokered the sales of these five lots in 1987);

(c) on or about August 10, 1987, Mr. Donaldson as health agent witnessed successful perc tests on a Tolland lot (8 Burt Hill Rd.) and, on or about August 28, 1987, Misty Mountain entered into a listing agreement for the property (Misty Mountain brokered the sale of this lot in 1988);

(d) in or about June 1988, Mr. Donaldson as health agent witnessed successful perc tests on lot SV-17 in Tolland, which was already listed for sale with Misty Mountain (Misty Mountain brokered the sale of this lot in 1988); and

(e) in or about July 1989, Mr. Donaldson as health agent witnessed successful perc tests on as many as five lots on Clubhouse Road in Tolland owned by Nick Bonadies (Bonadies) that Bonadies either had already listed for sale with Misty Mountain or as to which Mr. Donaldson and Bonadies had an understanding that they would be listed for sale with Misty Mountain (Misty Mountain brokered the sales of two of these lots in 1989).^{6/}

6. Except as otherwise permitted by that section, G.L. c. 268A, §19, in relevant part, prohibits a municipal employee from participating, as such, in a particular matter in which he or a business organization in which he is serving as an officer, director or employee has a financial interest. None of the exceptions to G.L. c. 268A, §19 applies in this case.

7. The perc tests of the land referred to above were particular matters within the meaning of G.L. c. 268A.^{7/} Mr. Donaldson had a financial interest within the meaning of G.L. c. 268A^{8/} in the perc tests of land that was either listed for sale with Misty Mountain or which he had an understanding or a reasonable expectation would be listed for sale with Misty Mountain, if it perced successfully, in that Mr. Donaldson stood to sell and receive commissions on land which passed a perc test. Mr. Donaldson was aware of this financial interest at the time he witnessed the perc tests of the land referred to above. While Mr. Donaldson did not conduct the perc tests himself, his witnessing of those perc tests as the official representative of the town board of health was personal and substantial participation in the tests for the purposes of G.L. c. 268A.

8. Thus, by witnessing, as the Tolland Health Agent, perc tests of land which was already listed for sale with Misty Mountain or which he had an understanding or expectation would be so listed if it perced successfully, as described above, Mr. Donaldson participated officially, as health agent, in particular matters in which he had a financial interest. In so doing, Mr. Donaldson violated §19.

In view of the foregoing violation of G.L. c. 268A, §19 by Mr. Donaldson, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Mr. Donaldson:

(1) Mr. Donaldson will pay to the Commission the sum of two thousand dollars (\$2,000.00) as a civil penalty for violating G.L. c. 268A, §19;

(2) Mr. Donaldson will pay to the Commission the sum of one thousand dollars (\$1,000.00) as restitution of the perc test witness fees he received in violation of G.L. c. 268A, §19; and

(3) Mr. Donaldson waives all rights to contest the findings of fact, conclusions of law, and terms and conditions contained in this Agreement in this or any related administrative or judicial proceeding to which the Commission is or may be a party.

Date: March 24, 1993

^{1/} It is also Mr. Donaldson's practice to advise persons seeking to buy land through Misty Mountain to have the land perc tested as a condition of purchase.

^{2/} Not all of the perc tests witnessed by Mr. Donaldson on land listed for sale with Misty Mountain, or expected to be listed for sale with Misty Mountain if the land perced successfully, were successful.

^{3/} Generally, the commission received by Misty Mountain was 10% of the selling price.

^{4/} This Disposition Agreement imposes sanctions only with regard to Mr. Donaldson's actions in witnessing perc tests since 1987, as the Commission's statute of limitations, 930 CMR 1.02(10)(f), bars the Commission's sanctioning of violations which occurred more than six years ago.

^{5/} No broker's commission was received by Misty Mountain for the sale of lot EO-19, which was purchased by Mr. Donaldson and his wife.

^{6/} As the Tolland Health Agent, Mr. Donaldson received approximately \$1,000 in fees for witnessing the perc tests on the lots referred to in paragraph 5.

^{7/} Section 1(k) of G.L. c. 268A, in pertinent part, defines "particular matter" to include any "... application, submission ... decision, determination, finding ..."

^{8/} "Financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. See *Graham v. McGrail*, 370 Mass. 133 N.E. 2d 888 (1976). This definition has embraced private interests, no matter how small, which are direct, immediate or reasonably foreseeable. See *EC-COI-84-98*. The interest can be affected in either a positive or negative way. See *EC-COI-84-96*.